Lee Ah Lan v Lee Kim Lan Constructions Industries Sdn Bhd & Anor

HIGH COURT (MELAKA) — CIVIL NO 22–107 OF 1996
LOW HOP BING J
19 DECEMBER 2002

Civil Procedure *— Amendment — Defence and counterclaim — Leave to amend — Whether the second defendant had acted mala fide in making the application — Whether the nature of the proposed amendment would prejudice the first defendant's defence — Rules of the High Court 1980 O 20 r 5*

This is the second defendant's application in encl (110) made under O 20 r 5 of the Rules of the High Court 1980 for leave to amend the defence and counterclaim ('the application'). The effect of the proposed amendment was, first to delete paras 5–14 of the second defendant's defence and to substitute thereof new paras 12 and 13. Secondly, the proposed amendment sought to delete the second defendant's counterclaim against the plaintiff. The issues for the determination of the court were: (i) whether the second defendant had acted mala fide in making the application; and (ii) whether the nature of the proposed amendment would prejudice the first defendant's defence.

Held, granting leave to amend the second defendant's application:

(1) The grant or refusal of leave to amend was to be determined by reference to the exercise of judicial discretion by the court depending on the circumstances of each case and this discretion must be exercised judicially. A party such as the second defendant should not be denied leave to amend her defence and counterclaim in order to make good the defects in the pleadings so as to enable the real issues between the parties to be tried and determined (see pp 414I–415B); *Raphael Pura v Insas Berhad & Anor* [2001] 1 MLJ 49 and *Kam Hoy Trading v Kam Fatt Tin Mine* [1963] MLJ 248 referred.

(2) The fact that the proposed amendment did not seem to fit into the scheme of things as spelt out in the first defendant's pleadings or did not appear to coincide with the defence of the first defendant, did not demonstrate one way or the other the bona fide or mala fide of the second defendant, because the second defendant as a party was perfectly entitled to arrange or conduct her defence or pleading in the best way to serve her interest as the utmost priority, and indeed without any due regard whatsoever to the interest of any other party. The same principle would apply if the first defendant were to apply for leave to amend the first defendant's pleading (see p 415C–D).

(3) On the issue of delay, since the commencement of the trial herein, ie from February 1997 to the date of this application on 10

August 2001 which covered a period of some four years, the second defendant had in her affidavit and cross-examination thereof by learned counsel for first defendant given a detailed account and explanation of her perception and impression of attending court as a witness as opposed to being a party or at least she was labouring under such a perception and impression. Thus, the delay had been reasonably explained by the second defendant specifically in respect of the perception and impression as to her capacity of a witness or a party, and also of the correct reflection of instructions to the new learned counsel (see p 415D–E, H).

(4) The prejudice, if any, to the first defendant may be compensated by an award of costs of RM350 to the first defendant, who together with the plaintiff are also given leave to amend the defence, if the first defendant and the plaintiff are inclined to do so, within 14 days after the service of the second defendant's amended defence on the first defendant and on the plaintiff respectively (see pp 415I–416A).

[Bahasa Malaysia summary

Ini adalah permohonan defendan kedua dalam lampiran (110) yang telah dibuat di bawah A 20 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk kebenaran meminda pembelaan dan tuntutan balas ('permohonan tersebut'). Kesan cadangan pindaan tersebut adalah, pertama, untuk memotong perenggan-perenggan 5–14 kepada pembelaan dan seterusnya menggantikannya dengan perenggan-perenggan 12 dan 13 yang baru. Keduanya, pindaan cadangan tersebut memohon untuk memotong tuntutan balas defendan kedua terhadap plaintif. Persoalan-persoalan untuk ditentukan oleh mahkamah adalah: (i) sama ada defendan kedua telah bertindak secara mala fide semasa membuat permohonan tersebut; dan (ii) sama ada sifat cadangan pindaan tersebut akan memprejudiskan pembelaan defendan pertama.

Diputuskan, memberikan kebenaran untuk membuat pindaan kepada permohonan defendan kedua:

(1) Kebenaran atau keengganan memberikan kebenaran membuat pindaan patut ditentukan dengan merujuk kepada pelaksanaan budi bicara kehakiman oleh mahkamah bergantung kepada keadaan-keadaan setiap kes dan budi bicara ini patut dilaksanakan secara adil. Satu pihak seperti defendan kedua tidak sepatutnya dinafikan kebenaran untuk meminda pembelaan dan tuntutan balas beliau bagi tujuan memperbetulkan kecacatan dalam pliding untuk membolehkan persoalan-persoalan sebenar antara pihak-pihak dapat dibicara dan ditentukan (lihat ms 414I–415B); *Raphael Pura v Insas Berhad & Anor* [2001] 1

MLJ 49 dan *Kam Hoy Trading v Kam Fatt Tin Mine* [1963] MLJ 248 dirujuk.

(2) Hakikat bahawa cadangan pindaan tersebut tidak sesuai dalam skim pliding defendan pertama atau tidak bersesuaian dengan pembelaan defendan pertama, tidak menunjukkan dalam apa cara sekalipun bona fide atau mala fide defendan kedua, kerana defendan kedua sebagai satu pihak memang layak untuk mengatur atau mengendalikan pembelaan atau pliding beliau sebaik mungkin demi kepentingan beliau, dan tanpa mengira apa-apa kepentingan mana-mana pihak lain. Prinsip yang sama akan terpakai jika defendan pertama memohon kebenaran untuk meminda pliding defendan pertama (lihat ms 415C–D).

(3) Berhubung isu kelewatan, semenjak dari perbicaraan ini bermula, iaitu daripada Februari 1997 sehingga tarikh permohonan ini pada 10 Ogos 2001 yang meliputi satu tempoh lebih kurang empat tahun, defendan kedua telah, dalam afidavit dan pemeriksaan balas beliau oleh peguam yang bijaksana bagi defendan pertama, memberikan satu butiran dan penjelasan terperinci tentang persepsi dan tanggapan menghadiri mahkamah sebagai seorang saksi dan bukan sebagai satu pihak atau sekurang-kurangnya beliau berada di bawah satu persepsi dan tanggapan sedemikian. Oleh itu, kelewatan tersebut telah diterangkan secara munasabah oleh defendan kedua khususnya berkaitan persepsi dan tanggapan beliau dalam kapasiti seorang saksi atau satu pihak, dan juga gambaran arahan yang betul kepada peguam bijaksana yang baru (lihat ms 415D–E, H).

(4) Prejudis, jika ada, terhadap defendan pertama boleh diberikan pampasan dengan satu award untuk kos sebanyak RM350 kepada defendan pertama, yang bersama plaintif juga diberikan kebenaran untuk meminda pembelaan, jika defendan pertama dan plaintif ingin berbuat demikian, dalam tempoh 14 hari selepas penyampaian pembelaan pindaan defendan kedua ke atas defendan pertama dan ke atas plaintif masing-masingnya (lihat ms 415I–416A).]

Notes

For cases on amendment of defence and counterclaim, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 453.

Cases referred to

Angel Cake House Sdn Bhd & Ors v Bandaraya Development Bhd [2001] MLJU 24 (refd)

Gurbachan Singh & Ors v Tetuan Muthu & Lee & Anor [2001] MLJU 82 (refd)

Kam Hoy Trading v Kam Fatt Tin Mine [1963] MLJ 248 (refd)

Raphael Pura v Insas Berhad & Anor [2001] 1 MLJ 49 (refd)

Syarikat Ying Mui Sdn Bhd v Muthusamy a/l Sellapan and other appeals [1999] 6 MLJ 622 (refd)

Taisho Co Sdn Bhd v Pan Global Equities Bhd & Anor [1999] 1 MLJ 359 (refd)

Yamaha Motor Co Ltd v Yahama Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213 (refd)

Yoong Leok Kee Corporation Sdn Bhd v Chin Thong Thai [1981] 2 MLJ 21 (refd)

Legislation referred to

Rules of the High Court 1980 O 20 r 5(1)

S Letchumanan (*Letchu Suppiah & Co*) for the first defendant.

Liza Chan Sow Keng (*Liza Chan & Co*) for the second defendant.

Low Hop Bing J: This is the second defendant's application in encl (110) made under O 20 r 5 of the Rules of the High Court 1980 for leave to amend the defence and counterclaim ('the application').

The effect of the proposed amendment is, first to delete paras 5–14 of the second defendant's defence and to substitute thereof the following new paras 12 and 13:

> 12 Sehubungan perenggan ketiga puluh tiga tuntutan plaintif, defendan kedua menegaskan defendan kedua akan memberi kebenarannya dengan menandatangani segala dokumen yang diperlukan untuk membahagikan tanah tersebut asalkan tanah yang dituntut oleh plaintif tidak memasuki bahagian tanah defendan kedua mengikut perjanjian 1972.
>
> 13 Maka defendan kedua memohon, jikalau mahkamah mulia ini berpendapat plaintif adalah tuanpunya benefisial yang sah bagi sub-lot 2, 3, 13 dan 14, mahkamah yang mulia ini patut memerintahkan plaintif menanggung sebahagian kos yang dikenakan mengikut bahagian atau kadar tanahnya untuk penukaran syarat kegunaan tanah tersebut dan pemecahan bahagian membahagikan tanah tersebut.

[My translation:

> 12 With regard to para thirty-three of the plaintiff's claim, the second defendant avers that the second defendant will give her consent by executing all documents as required for sub-dividing the said land so long as the land claimed by the plaintiff does not encroach upon the second defendant's land pursuant to the 1972 agreement.
>
> 13 Therefore the second defendant applies, if this honourable court is of the opinion that the plaintiff is the real beneficial owner of sub-lots 2, 3, 13 and 14, that this honourable court should order the plaintiff to bear part of the costs to be imposed according to the part or proportion of the land for conversion of the conditions for use of the said land and subdivision of the said land.]

Secondly, the proposed amendment seeks to delete the second defendant's counterclaim against the plaintiff.

Grounds of application

The application is based on the following grounds:

1 to achieve the purpose of enabling the court to determine the real question in controversy between the plaintiff and the second defendant;

2 to show the second defendant's actual position and rights in these proceedings; and

3 to correct all defects in the second defendant's pleadings.

The plaintiff has no objection to the application.

Objection by first defendant

The first defendant through learned counsel, Mr S Letchumanan objects to the application, principally on the ground that the application is mala fide, adding that the second defendant must have known that the second defendant has always been a party and not a witness, and that the nature of the proposed amendment supports the plaintiff's case and would prejudice the first defendant's defence.

Response by second defendant

Ms Liza Chan, learned counsel for the second defendant, in addition to elaborating on the grounds of the application, submitted in essence, that the first defendant's objection is without merits, scandalous, perverse and not valid.

Decision of the court

The application calls for the interpretation of O 20 r 5(1) of the Rules of the High Court 1980, which, where relevant, provides as follows:

> ... the Court may at any stage of the proceedings allow the plaintiff to amend his writ or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

The expression 'at any stage of the proceedings' is certainly very wide, as has been demonstrated by the Federal Court in *Yoong Leok Kee Corporation Sdn Bhd v Chin Thong Thai* [1981] 2 MLJ 21 which allowed an amendment even at the conclusion of the trial.

The established principles governing the granting of leave to amend a party's pleadings have been authoritatively enunciated by the Federal Court with unrivalled clarity in *Yamaha Motor Co Ltd v Yahama Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 at p 214 as follows:

> ... the general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result: (1) whether the application was bona fide; (2) whether the prejudice caused to the other side can be compensated by costs; and (3) whether the

amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. A

In the light of the objection raised for the first defendant which falls within a narrow compass, ie the second defendant has acted mala fide in making the application, I shall confine my judgment to this issue alone.

The test of bona fide or mala fide may be illustrated through our decided cases. B

In *Yamaha Motor*, the Federal Court granted leave to the appellant to amend the statement of claim after pleadings were closed. The amendment sought had the effect: (a) that the appellant would be suing not only in their capacity as judgment creditors but also as majority shareholders of the first respondent company; and (b) that fraud or unlawful conspiracy would be pleaded expressly in the creation of the 1977 debenture instead of mere lack of consideration and security for a non-existent debt. There was no question of any mala fide arising in that application. C

In *Taisho Co Sdn Bhd v Pan Global Equities Bhd & Anor* [1999] 1 MLJ 359, the appellant only made an application to amend four years after the commencement of the action and after failing in his appeal to the Court of Appeal to dismiss the respondants' defence of limitation. The Court of Appeal upheld the judge's refusal for leave to amend as on the facts, the application borders on lack of bona fide. D

An application to amend the defence which would convert the defence into an inconsistent defence of a different character, coupled with a long and inordinate delay of more than ten years, without providing any explanation for the delay, was held by Tee Ah Sing J to be showing a lack of bona fide on the part of the defendant in *Angel Cake House Sdn Bhd & Ors v Bandaraya Development Bhd* [2001] MLJU 24. E

Similarly, the ground of substituting one cause of action with another by way of amendment and also a delay of some 12 years in applying for amendment ie from the filing of the suit on 7 March 1983 to the date of the application on 26 September 1995 without any explanation, was held by Clement Skinner JC (as he then was) to reflect the lack of bona fide: *Syarikat Ying Mui Sdn Bhd v Muthusamy a/l Sellapan and other appeals* [1999] 6 MLJ 622 (HC). F G

In *Gurbachan Singh & Ors v Tetuan Muthu & Lee & Anor* [2001] MLJU 82, the plaintiff's three year delay in applying for amendment after a dissolution of injunction and removal of caveat was held by Su Geok Yiam JC as a belated manoeuvre designed to extricate themselves from the predicament and therefore casting serious doubts on the bona fide of the plaintiff in making the application. H

An application for amendment in order to delay the trial of a defamation action was held to border on the lack of bona fides (see *Raphael Pura v Insas Berhad & Anor* [2001] 1 MLJ 49 (CA)).

Upon perusing the aforesaid decided cases, it is clear to me that at the end of the day, the grant or refusal of leave to amend is to be determined by reference to the exercise of judicial discretion by the court depending on the I

A circumstances of each case (see *Raphael Pura v Insas Berhad & Anor*) and this discretion must be exercised judicially (see *Kam Hoy Trading v Kam Fatt Tin Mine* [1963] MLJ 248).

In my view, a party such as the second defendant should not be denied leave to amend her defence and counterclaim as alluded above in order to B make good the defects in the pleadings so as to enable the real issues between the parties to be tried and determined.

It is trite law that at this stage, I am not the least concerned as to whether the proposed amendment would result in the success or otherwise of the second defendant in these proceedings (see *Yamaha Motor*).

C The fact that the proposed amendment does not seem to fit into the scheme of things as spelt out in the first defendant's pleadings or does not appear to coincide with the defence of the first defendant, does not demonstrate one way or the other the bona fide or mala fide of the second defendant, because the second defendant as a party is perfectly entitled to arrange or conduct her defence or pleading in the best way to serve her D interest as the utmost priority, and indeed without any due regard whatsoever to the interest of any other party. The same principle would apply if the first defendant were to apply for leave to amend the first defendant's pleading.

On the issue of delay, since the commencement of the trial herein, ie from February 1997 to the date of this application on 10 August 2001, E covering a period of some four years, the second defendant has in her affidavit and cross-examination thereof by learned counsel for first defendant given a detailed account and explanation of her perception and impression of attending court as a witness as opposed to being a party or at least she was labouring under such a perception and impression.

F The second defendant's then learned counsel Mr Maniam Raju of M/s Gunaretnam & Co, said to be acting for the second defendant, has also been subject to vigorous and incisive cross-examination. It is my specific finding that to some extent, there seems to be some communication gap between the second defendant and the said learned counsel pertaining to the facts of the case which form the basis of instructions to be included in the second G defendant's pleadings.

The proposed amendments would in my view be more reflective of the instructions of the second defendant given to the present learned counsel, although, as I have stated above, the merits thereof would have to be established after a full trial. The above circumstances prevailing in the H application have found no parallel in any of the decided cases referred to above.

In my judgment, the delay has been reasonably explained by the second defendant specifically in respect of the perception and impression as to her capacity of a witness or a party, and also of the correct reflection of instructions to the new learned counsel. Hence, I exercise my discretion in I granting leave to amend the second defendant's pleading as in encl (110). The prejudice, if any, to the first defendant may be compensated by an award of costs of RM350 to the first defendant, who together with the

plaintiff are also given leave to amend the defence, if the first defendant and the plaintiff are inclined to do so, within 14 days after the service of the second defendant's amended defence on the first defendant and on the plaintiff respectively.

Leave to amend the second defendant's application granted.

Reported by Ezatul Zuria Azhari